SUBJECT INDEX

	Brief Page
Petition for Writ:	1
Reference to opinions below	1
Jurisdiction	2
Questions Presented	2
Summary Statement of the facts	2
History of the pleadings and proceedings in the cause up to the reference	2
Facts adduced at reference	4
Proceedings in the cause after the reference	7
Statement of the holdings of the Court of Appeals, as pertinent to this petition	7
Statement of the decision of the 6th CCA in conflict with the decision of 5th Court of Appeals in *instant* case	8
Specification of errors to be urged	9
Reasons for granting the writ	9
Supporting Brief:	11
Additional Statement of the Case	11
Argument:	13
I. The marsh-island notion	13
Discussion of the *Toledo Shooting Co.* case	17
Comparison of that holding with the holding of the Court of Appeals in *instant* case	19-21
II. The Alabama doctrine of title to land added by reclamation or artificial accretion to the upland	21
General statement of the basic facts, incorporating therein the pertinent part of opinion of Court of Appeals	21
Establishment and early implementation of the doctrine	23
History and discussion of the modern decisions, relied on by the Court of Appeals	28
Turner's fill vested in him eastwardly and southwardly toward Mobile Bay as much as it would have done had the fill been westwardly toward the River	34
Conclusion	36

ALPHABETICAL TABLE OF AUTHORITIES

	Brief Page
Abbott's Exrs. v. Doe *ex dem* Kennedy, 5 Ala. 393	24, 25, 35
Act of the Legislature of Alabama of January 31, 1867 (Acts of Alabama of 1866-67, p. 307)	28
City of Mobile v. Sullivan Timber Co., 129 Fed. 298	28, 32
Code of Alabama of 1907, s 4818	33
Doe *ex dem* Kennedy's Exrs. v. Beebe, 13 How. 25	27, 28
Doe *ex dem* Kennedy vs. Beebe, 8 Ala. 909	25
Doe *ex dem* Kennedy's Exrs. v. Jones, 11 Ala. 63	26
Doe *ex dem* Pollard's Heirs v. Greit, 8 Ala. 930	26, 27
Hagan v. Campbell, 8 Port. (Ala.) 9	25
Leverich v. Mayor of Mobile, 110 Fed. 170	29
Magee vs. Doe, *ex dem* Hallett, 22 Ala. 689	23
McDonnell v. Murnan Corp., 210 Ala. 611 (98 So. 887)	28, 33, 34
Mobile v. Sullivan Timber Co. 129 Fed. 298	28, 32
Mobile Docks Co. v. Mobile, 146 Ala. 198	31
Mobile Transportation Co. v. Mobile, 128 Ala. 335	30, 31
Mobile Transportation Co. v. Mobile, 153 Ala. 409 (44 So. 976)	28, 31
Mobile Transportation Co. v. Mobile, 187 U. S. 479	32
Pollard v. Hagan, 3 How. 212	14, 15
Shively v. Bowlby, 152 U. S. 1	15
Sullivan Timber Co. v. Mobile, 110 Fed. 186	32
Toledo Shooting Co. v. Erie Shooting Club, 90 Fed. 680	9, 17, 18
3 U. S. Stat. at Large, 489-90, 492	13, 14, 19
3 U. S. Stat. at Large, 608	14
United States v. California, 332 U. S., 19	36
United States v. Oregon, 295 U. S. 1	15, 16
United States v. Realty Co., 155 Fed. 583	36

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1949

No._____

HORACE TURNER, Petitioner,

Vs.

UNITED STATES OF AMERICA and STATE OF ALABAMA, Respondents.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner Horace Turner, acting by and through his attorney of record, Palmer Pillans, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in that certain case lately therein pending, styled "United States of America and the State of Alabama, Appellants, versus Horace Turner, Appellee" and numbered 12597 on the docket of the said Court.

Opinions Below

The opinion of the learned District Judge is reported in 74 Fed. Supp. 92.

The opinions rendered by the learned Judges of the Court of Appeals, have not yet been published but are set

out in the copies of the printed record, filed herewith, at pp. 754-771.

Jurisdiction

The judgment of the Court of Appeals was rendered on June 10th, 1949. The jurisdiction of this Court is invoked under Sections 1254, cl. (1), and 2101, cl. (c), of Title 28, United States Code.

Questions Presented

(1) Was the defined marsh island known as Pinto Island, at the time of the patent conveying it to the heirs of Antonio Pinto in 1859, land of the United States that did not pass to the State of Alabama on her admission into the Union and that was susceptible to grant by patent by the United States?

(2) Did petitioner's title to his original upland spread with and attach to the land added thereto by the deposit of dredging spoil; in part by petitioner but in the main by the United States after seeking and obtaining petitioner's sanction?

Both questions were duly raised and argued in the trial Court and by the Court of Appeals.

Summary Statement of the Facts

I

On October 21st, 1941, the United States filed, in the U. S. District Court at Mobile, its petition seeking to condemn the parcel of land involved in this controversy. The petition was the usual petition to condemn (Rec. p. 2-8); and it sought, and procured, an order for immediate possession (Rec. 8). That possession was taken at once and there was built a great extension southward of the shipbuilding plant of the Alabama Dry Dock and Shipbuilding Company, which Company was building ships for the United States Maritime Commission. The acts and things

done upon and with the land by the United States so altered it as to render very difficult, if not impossible, to fix now with certainty the lines as they existed at the time of taking. (See concluding paragraph of Judge Sibley's opinion in Court of Appeals; Rec. 763).

II

The condemnation petition named as personal defendants, Mr. Turner (the present petitioner for the writ of certiorari), caretakers that he had on the property, the City of Mobile, and officials of the County of Mobile and of the State of Alabama.

III

Mr. Turner answered at length, setting out his interest and claiming the right to be paid the entire compensation to be awarded ultimately for the taking (Rec. 17-22).

The State of Alabama answered that it claimed no interest except a claim for taxes assessed against Mr. Turner for the tax-year beginning October 1, 1941 (Rec. 15).

Mobile County's interest was in the tax only and such was stated by the Tax Collector who appeared at the reference to be mentioned later.

The City of Mobile had no interest and did not appear in the litigation; nor did Mr. Turner's caretakers.

IV

No further action taken by the United States and the matter remained quiescent on the docket until November 2nd, 1944, when the United States filed a petition that averred, in substance: that the land; which it sought condemnation of, and which it had been in possession of for more than three years; had belonged to the United States all the time and and did not need to be condemned. This petition sought a reference "to determine and adjudicate title" (Rec. 22-25).

V

On the petition last mentioned, the Court made an order of reference to a Master.

Before the matter came on to be heard before the Master, the United States amended its *condemnation* petition so as to aver that the sovereign owned the land it was seeking to condemn (Rec. 31-32). This attempted conversion of a condemnation petition into a bill to quiet title, was made on April 20th, 1945.

On May 14th, 1945, the State of Alabama reversed *its* position and claimed title in it to the premises sought to be condemned (Rec. 36-37).

VI

There was a full hearing before the Master on oral testimony and a multitude of maps. The maps were not susceptible of reproduction in the printed record in the Court of Appeals, and were certified up to that Court under appropriate Rule.

By the testimony, there were established without controversy the facts noted in the following lettered paragraphs:

(a) In 1859 the United States patented Pinto Island to the heirs of Antonio Pinto.

(b) Dealings were had with Pinto Island, and Blakely Island next north of Pinto, actively over a period beginning long before 1859 and continuing until the middle eighties when a bill-in-Chancery was filed for the purpose of partitioning the land among the large number of owners of fractional rights (Rec. 245-261).

(c) The bill went forward to final decree on May 7th, 1891 (Rec. 294-305), by which Pinto Island was awarded to Charles M. Bancroft.

(d) In 1904 Horace Turner and Harry T. Hartwell bought, from Bancroft's successor in interest, the southern end of Pinto Island (Rec. 315-19).

(e) In 1906 Mr. Turner built a bulkhead along the Mobile River edge of his Pinto Island property, and in front of that bulkhead he built a wharf out toward the channel of the river. He employed a dredging company to dredge, at the same depth as the ship channel in the river, in to his wharf so that ships might lie there and load or discharge. As pay for such dredging, he conveyed to the Dredging Company, a strip 645 feet wide north-and-south and running east-and-west across the whole width of the southern end of the Island bought by Mr. Turner (Rec. 324-25). The dredging spoil was pumped on to the land retained by Mr. Turner south of the strip conveyed to the dredging company. Mr. Turner also deposited behind the bulkhead, ballast from ships that lay at his wharf.

(f) The bulkhead was 700 feet long and ran from the dividing line, between Turner and the 645-foot strip next north that he had conveyed to the Home Dredging Company (the dredger mentioned in the last paragraph), to the south end of Pinto Island as it then was. The wharf in front was the same length as the bulkhead.

(g) From the time of the patent in 1859 to the dredging-spoil fill in 1906, Pinto Island remained completely unchanged except for such changes, if any, as were effected by nature.

(h) After the filling, by the Home Dredging Company in 1906, and before any subsequent deposit of dredging spoil, the Turner property on Pinto Island was approximately 1500 feet across at its northern end, 500 feet across at the southern end, 700 feet long on a north-and-south line along the bank of Mobile River, and with a line running along its easterly side in a southwesterly direction with approximately constant slant from the 1500 feet top-width to the 500 feet bottom-width.

(i) Mr. Turner spent about $35,000.00 on his wharf and bulkhead; and paid State and County taxes on the land from the time of its purchase in 1904, down to its taking in 1941.

(j) Mr. Turner, before the taking, had bought the interest of Mr. Hartwell, and Mr. Turner alone has been the sole party at interest at all times pertinent to this litigation.

(k) Beginning in 1923 and continuing from time to time through 1939, the United States, in its dredging work in Mobile River, sought of, and obtained from, Mr. Turner permission to deposit hydraulic dredging spoil on Mr. Turner's property on Pinto Island (Rec. 334-348, and see Rec. 121-122). This was highly advantageous to the United States, because of the great saving of expense that would have been incurred had the United States been obliged to use some other method of disposing of the spoil.

(l) By the successive deposits of dredging spoil, the Turner end of the Island was expanded eastwardly and southwardly to make, with what Turner already had, the area that constitutes the land sought by the United States to have condemned.

VII

Before the Special Master, evidence was adduced that tended to show that at least some part of the Turner property was flowed at ordinary high tide, and other evidence was adduced that tended to deny this.

VIII

The Master found that Mr. Turner had taken initially only a small piece of "fast land"; that he had dredged this away; and that he had no title to any part of the land sought to be condemned.

IX

Mr. Turner excepted to the Master's report; and, upon sundry mesne proceedings, the learned District Judge sustained completely Mr. Turner's contention on the title questions sent to reference and ordered the matter to proceed to a determination of the quantum of award. As he set out fully his findings of fact and conclusions of law (see 74 Fed. Supp. 92, 94-105), they are not summarized here.

X

In regular course, Commissioners were appointed, viewed the land, made their report, exceptions were filed to the report, the case was tried to a jury on the measure of damage, and verdict rendered fixing the award at $60,650.00.

XI

Appeal was taken, by both the United States and the State of Alabama, to the Court of Appeals for the Fifth Circuit, which reversed the judgment of the District Court and remanded the cause. Each of the learned Judges who heard and determined the case, wrote an opinion. The preveiling opinion was written by Judge Hutcheson. Judge Sibley wrote a concurring opinion. Judge Waller wrote an opinion dissenting in important part from the majority opinion.

The majority opinion, and the resultant judgment of the Court, declare that (a) any of Pinto Island (as it existed before the deposit of any dredging spoil and consequent addition by reclamation or artificial accretion) that was flowed by ordinary high tide, was land beneath navigable water and hence never passed to Mr. Turner; and (b) that Mr. Turner procured no title to the land added, by reclamation or artificial accretion, to his upland. The order, reversing and remanding the cause, instructed the trial court

"to determine precisely the part of the land taken which was true fast land, that is, originally fast land or formed by accretion, and what part of the fund awarded for the whole should be awarded to Turner."

XII

In *Toledo Shooting Company v. Erie Shooting Club*, 90 Fed., 680, the Circuit Court of Appeals for the Sixth Circuit (both Judges Taft and Lurton sitting at that time on that Bench) had before it for consideration the status of marsh land in Maumee Bay; indistinguishable in principle, it is thought, from Pinto Island — except that much of Pinto Island was undeniably above the flow of mean low tide, whereas *all* of the marshland was submerged in the *Maumee Bay* case. The determination of the controversy before that Court hinged on whether the submerged marsh land had passed to the State, as land under navigable water; or, though submerged, had not passed because not constituting navigable water, and remained in the United States as waste, unappropriated land subject to patent. So the question involved was identical in principle with the question involved here. The Circuit Court of Appeals for the *Sixth Circuit* held that the marsh island, though submerged, was a defined area, did not constitute navigable water, that the title did not pass to the State as land under navigable water but remained in the United States, subject to patent, and had been patented validly by the United States.

So the same principle was involved as is involved in the instant case and was decided by the Circuit Court of Appeals for the Sixth Circuit in accordance with the insistence of petitioner in the instant matter.

Consequently, there is conflict of decision between the Circuit Court of Appeals for the *Sixth* Circuit, on the one hand, and the Court of Appeals for the *Fifth* Circuit, on the other. The determination of the question thus involved

in conflict of decision between two of the Courts of Appeal, has never been presented directly to the Supreme Court.

Specification of Errors to be urged.

It is submitted, respectfully, that the learned Court of Appeals for the Fifth Circuit erred in the particulars set out below:

(1) In holding that, if the water flowed at mean high tide over any part of the lower end of the defined marsh island known as Pinto Island, that part constituted navigable water, title to the soil beneath which had passed to the United States upon the admission of Alabama to the Union, and was not conveyed to petitioner's predecessors in interest by the patent granting Pinto Island.

(2) In holding that petitioner Horace Turner did not take title to the entire area of the defined lower end of Pinto Island as a defined marsh area, if, as to any part of it, the water flowed over it at mean high tide.

(3) In holding that under Alabama law petitioner, as riparian proprietor of the upland, did not acquire title to the addition and extension of the upland made by artificial reclamation or accretion by the deposit of dredging spoil.

(4) In reversing the judgment of the District Court of the United States for the Southern District of Alabama, Southern Division.

Reasons for granting the writ

(1) The decision of the learned Court of Appeals for the Fifth Circuit on the marsh-island question, is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in the case of *Toledo Shooting Co. v. Erie Shooting Club*, 90 Fed., 680.

(2) The learned Court of Appeals for the Fifth Circuit has decided an important question of Federal law: to-wit, the question of the validity and extent of patents or grants of defined marsh islands, which has not been directly, but should be, settled by the Supreme Court.

(3) The learned Court of Appeals for the Fifth Circuit has decided a Federal question (the marsh-island question) in a way probably in conflict with applicable decisions of this Court.

(4) The learned Court of Appeals for the Fifth Circuit has decided an important question of local law (Alabama law of title to land added to the property of an upland owner by artificial accretion or reclamation) probably in conflict with applicable local decisions.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may issue out of and under seal of this Honorable Court, directed to the United States Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court, on a day certain, to be designated therein, a full and complete transcript of the record and all proceedings of the said Court of Appeals in that certain cause therein pending, styled: "United States of America and the State of Alabama, Appellants, versus Horace Turner, Appellee", and numbered 12597 on the docket of the said Court; to the end that the said record and cause may be reviewed and determined by this Court, as provided by law; and that your petitioner may have such other and further or other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with law; and that the said judgment of the said Court of Appeals may be reversed by this Honorable Court, and a judgment or decree here rendered confirming the judgment of the trial court in petitioner's favor.

Your petitioner accompanies this petition with a certified transcript of the record in the case, including the pro-

ceedings in the said United States Court of Appeals for the Fifth Circuit; and your petitioner appends to this petition his supporting brief.

HORACE TURNER, *Petitioner,*
By PALMER PILLANS,
His Attorney.

SUPPORTING BRIEF

Statement of the Case

The statement heretofore set out in that portion of the petition which is styled "Summary Statement of the Facts" is hereby referred to and adopted. The additional matter set out below is thought worthy of consideration in connection therewith.

The initial petition of the United States declared that the "lands sought to be *condemned*" are "necessary *for the United States to acquire* in this proceeding" for the uses and purposes set out in the petition (Rec. 4). (our emphasis).

In the prayer for relief, the United States seeks all such

> "orders, judgments and decrees as may be necessary to vest in the United States of America the absolute and unencumbered fee simple title",

to the lands described in the petition and sought to be condemned (R. 7).

On the same day (October 21, 1941), the United States filed; in the office of the Judge of Probate of Mobile County, Alabama; a *Lis Pendens* Notice, (R. 331) which recites that the United States

> "is seeking for certain public purposes * * * * * * *the acquisition by condemnation proceeding,* of the legal title to the following described lands". (our emphasis). (R. 332)

The "following described land" is the land described in the United States' petition for condemnation filed that same day; and in the order for immediate possession, that issued on that same day.

On October 23d, 1941 there issued, from the office of the Clerk of the Court, a formal notice (R. 11-13); addressed to Mr. Turner and the other defendants named in the notice; that, on October 21st, the United States had filed its petition for condemnation of the lands for the construction of ships, etc.; and that on that same day the Court had granted an order for immediate possession of the said lands so sought to be condemned and that

> "the *estate sought to be condemned* for said public uses in the said lands * * * * * * *is the full fee simple title* thereto". (our emphasis). (R. 12)

The notice informed Mr. Turner that

> "The lands sought to be condemned and acquired and hereinabove referred to are located in Mobile County, Alabama and consist of all that portion of Pinto Island * * * * * * * * * * * * which lies south of the present holdings of the Alabama Dry Dock & Shipbuilding Company * * * *". (R. 12)

Then follows a description by metes and bounds.

The patent to the heirs of Antonio Pinto, granted

> "The Lot or fractional parts of Section numbers twenty-four and twenty-five being an Island between Choctaw Pass and Ship Channel opposite Mobile in Township 4 South of Range one West * * * * * * * * * * * * containing forty-two acres seventy-five hundredths of an acre, according to the official Plat of the survey of the lands returned to the General Land Office by the Surveyor General * * * * * * * * * * * * * * *."

(Turner Exhibit 1; Rec. 243).

The "Official Plat", of the Patent, is Turner's Exhibit 2. It was made at some time prior to July 10th, 1857, the date of the certificate by the Surveyor General of Alabama. This plat was not incorporated in the printed Record but was certified up under the appropriate rule.

The patent shows that the land was entered by Pinto at some unstated earlier date; and that his heirs had paid out in full for the land and had patent issue, as already noted, on March 1, 1859. We know; from the original Bill,

with its exhibits, filed in Chancery at Mobile by McDonald and March v. Wm. Otis, *et als.*, some sixty odd years ago (Turner's Exhibit 3; R. 245 *et seq*); that, in 1852, Antonio Pinto's widow and heirs conveyed Pinto Island to Campbell and Cleveland; so that Pinto's claim to the Island antedates 1852.

The plat shows the acreage of the Island, at whatever time the plat was made—certainly, it would seem, somewhere between 1852 and 1857; probably in 1857—as 42.75 acres; and the patent so states the acreage.

ARGUMENT.

I

Turner and Hartwell took land (not water), held it continuously, and Mr. Turner still had the original land, materially increased in height, when the United States began its condemnation proceeding in 1941. For the patentees of Pinto Island took the entire area comprising the marsh island, whether or not submerged, in part or in whole, at mean high tide. Pinto Island was a defined area susceptible to grant as waste and unappropriated land of the United States.

Alabama became a State of the American Union pursuant to Act of Congress of March 2, 1819, and the matters and things done in pursuance thereto. This Act is contained in 3 U. S. Stats. at Large, page 489. It authorized the inhabitants of the Alabama territory, should they desire statehood, to elect delegates to a convention for that purpose, which convention should adopt a Constitution that should be republican in form, and should be in harmony with the political principles of our republic. This having been done, they were to report to the Congress of the United States what they had done, and should accompany their report with a copy of the Constitution as adopted. The said Act, in its first section, declared:

> "that the said territory, when formed into a State, shall be admitted into the union, upon the same footing with the original states, in all respects whatever."
>
> *3 U. S. Stats. at Large, 489-490.*

The people of Alabama held the convention, accepted the provisions tendered by the United States, and reported their actions to the Congress, accompanying the report with a copy of the Constitution. Thereupon, the Congress, on December 14, 1819, adopted a joint resolution reciting what had taken place and declaring Alabama admitted as a State of the Union. The language of the Resolution, after the preamble reciting the facts, is:

> "That the State of Alabama shall be one, and is hereby declared to be one, of the United States of America and admitted into the Union, on equal footing with the original states, in all respects whatever."
>
> *3 U. S. Stats. at Large, 608.*

It will be noted that in both these statutes, it is specifically declared that Alabama is to be, and then is, admitted into the Union "on the same footing with the original states, in all respects whatsoever".

The original States owned the title to the soil beneath navigable waters within the boundaries of the said several original States, respectively. For Alabama to be admitted to the Union on the same footing with the original States, meant that Alabama should become the owner and proprietor of the soil beneath the navigable waters within the boundaries of the State of Alabama. This was so decided at an early date in our State's history, and was definitely fixed by this Court, in *Pollard v. Hagan*, 3 How. 212, 222, 223, 225, 228-29. In this case, the Court said:

> "When the revolution took place, the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them, for their

> own common use, subject only to the rights since surrendered by the Constitution. Then to Alabama belongs the navigable waters and soils under them * * * * * subject to the rights surrendered by the Constitution to the United States; * * * * *".
> *3 How., 212, 229.*

This case was decided something over a century ago, and the decisions have been uniform since, to the same effect.

The other new States were admitted under statutes containing substantially the same phraseology (as to the equal footing with the original States), and in decisions in appeals going up from other States, the doctrine has been reiterated. For example, the doctrine was stated again in the famous case of *Shively v. Bowlby*, 152 U. S. 1, 26, 27-28; and quite recently, in *United States v. Oregon*, 295 U. S., 1, 6, 14.

It is because of the doctrine just stated, that all are agreed that the State of Alabama held the title to the soil beneath the navigable waters within the boundaries of our State, and therefore beneath the navigable waters in the River Mobile and the other waters surrounding and in the vicinity of Pinto Island.

Where we part company is in the concept of the extent of the phrase "navigable waters" as used throughout the decisions. It is the insistence of the two sovereigns, accepted by the learned Court of Appeals below, that the phrase includes all marsh lands over which the tide ebbs and flows; and that, consequently, so much of the area of Pinto Island, if any there was, as was covered by water at high tide, was a part of navigable water, and hence the property of the State, notwithstanding that it was in no sense water, but was well-defined marsh island.

We now attempt to show that this contention and holding are untenable, without departing from what has heretofore been thought to be law.

That the phrase "navigable waters," in the sense now under discussion, as used in the decisions and as contem-

plated from the beginning in our jurisprudence and public polity, has meant, and has meant only, *water which is navigable in fact*; appears amply from the decisions. The matter is stated clearly in *United States v. Oregon*, (295 U. S. 1), just hereinabove cited. In that case, the controversy was between the State of Oregon on the one hand, and the United States on the other, over the title to the soil beneath the beds of certain lakes in the State of Oregon. The determination hinged on whether the lakes constituted "navigable waters" so as to entitle Oregon to the soil beneath them, under the Act admitting Oregon into the Union; or did not constitute navigable waters within the intendment of that phrase as so used (in which case the title would be in the United States, as unappropriated public land). There is a full and learned discussion of that question. As here pertinent, the court said:

> "If the waters were navigable *in fact*, title passed to the State upon her admission to the Union." (citing *Shively v. Bowlby*, and other cases
>
> • • • • • • • • • • •
>
> "For that reason (referring to a discussion of sovereignty just made before, *arguendo*) upon the admission of a State to the Union, the title of the United States to lands underlying the navigable waters within the State passes to it, as incident to the transfer to the State of local sovereignty, and is subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce. *But if the waters are not navigable in fact, the title of the United States to land underlying them remains unaffected by the creation of the new State.*" (Our emphasis)
>
> *United States v. Oregon*, 295 U. S., 1, 6, 14.

It ought not to require much argument, it is submitted with respect, to sustain the position that no one would have thought that a defined marsh island would constitute navigable water within the intendment of the stated doctrine.

And, that a marsh island does *not* constitute such navigable water, appears from the adjudged cases.

The case most nearly in line with the instant case on the facts, is *Toledo Shooting Company v. Erie Shooting Club*, 90 Fed., 680. That was decided by the Circuit Court of Appeals for the Sixth Circuit when both Judges Taft and Lurton were members of that Court. The case involved a controversy over rights to property in Maumee Bay. The Bay was an inlet, bay or arm of Lake Erie and was *submerged* marsh land, about 4000 acres in extent. *The United States, through its executive officers, had regarded these lands not as navigable lands but as public lands of the United States; and had platted and patented the lands to the State of Michigan* as swamp or over-flowed lands, under the swamp and over-flowed land Act of 1850. By mesne conveyances, the Toledo Shooting Company had acquired a lease on almost all of the marsh land area, but not all of it.

The Erie Shooting Club had acquired a lease of about 106 acres of this submerged marsh land, which was surrounded completely by the holdings of the Toledo Shooting Company. So the members of the Erie Club, going to and from their holdings, had to cross the holdings of the Toledo Company. Much friction resulted, and finally the Toledo Shooting Company filed its bill in equity to enjoin the members of the Erie Club from crossing the Toledo Company's land except by a specific way of necessity, which should be set out in the decree. The Erie Club defended on the theory that the submerged marsh lands claimed by the plaintiff, were "lands under navigable waters"; and that, hence, the respondents had the right to navigate the said waters along any course that they chose, and had violated no right of the complainant. The trial judge found against this contention and in favor of the complainant. Upon appeal, this decree was affirmed. In reaching the conclusion that the trial Judge was right in

holding that this marsh area was *land*, and *not* navigable water, the Court said, as here pertinent:

> "The contention that the waters covering the submerged part of the lands claimed under lease by the Erie Shooting Club are navigable and therefore subject to the public right of navigation, is not supported by the evidence, in this record. *The fact that this so-called 'Bay' was surveyed and platted as swamp land by the government, affords a strong presumption against the navigability of the water thereon* * * * * * * * * * * * *.
> From June to October, this body of water is covered with a mass of acquatic vegetation, such as wild rice, rushes, etc. It is then impenetrable, save by the laborious method of punting. At no time is the greater part of this marsh susceptible of supporting 'commerce' in any reasonable sense of the term. *That the water stands permanently, and that it has a deep opening into Lake Erie, does not establish that this shoal bed of water is capable of sustaining commerce, or is burdened with a public use. It is nothing more or less than a marsh opening into the Lake. To be navigable in law, it must be navigable in fact; that is, capable of being used by the public as a highway for the transportation of commerce.*
>
> "None of the characteristics of commercial navigability are shown here. It is the natural feeding ground of the duck and other water fowl. In their pursuit by canoe and flat-bottomed ducking boats, the water may be navigated. That is not commerce and proves nothing. The same test would convert every * * * * * swamp capable of floating a boat into a navigable stream or lake * * * * * *. It is capability of being navigated for useful purposes, which is the test." (our emphasis)
>
> *Toledo Shooting Co. v. Erie Shooting Club*, 90 Fed. 680, 681, 682.

The facts are set out in detail both in the statement of the case and in Judge Lurton's opinion, and show a case

for navigability much stronger than is shown here with reference to Pinto Island.

By the proviso which concluded Section 6 of the Act of March 2, 1819, with reference to the admission of Alabama into the Union, it was required that the Alabama Convention, called for the purpose of considering statehood, should provide, by an ordinance irrevocable without the consent of the United States, that the people do agree and declare that they

> "forever disclaim all right and title to the waste or unappropriated lands lying within the said territory; and that the same shall be and remain at the sole and entire disposition of the United States * * * * * *."

3 U. S. Stats. at Large, 489, 492.

So it is thought with respect that it may be asserted justly that the marsh island known as Pinto's Island, was "waste or unappropriated lands," the title to which was in the United States, over the entire area of the defined marshy island without reference to whether or not ordinary high tide flowed over some part of the area; and the patentees from the United States, and their successors in interest, took valid title to the whole area of the said marshy island, as *land.*

If this position be sound, we are wholly unconcerned with all the labor and debate that was devoted in the trial Court to whether or not the water at mean high tide rose over the southern tip of the island on which Powell Williams hunted snipe, and whether or not there were any sloughs across it. Under the doctrine of the decisions hereinbefore cited and discussed, there was never any navigable water there and never any soil that belonged to the State.

The holding of the learned Court of Appeals on this point is contained in the opinion written by Judge Hutcheson. It is brief and is set out below:

> "His (Turner's) only point is that since the waters flowing the island are too shallow for actual naviga-

> tion, it cannot be said thereof that, though a part of Mobile Bay, they are navigable waters.
> "That this will not do is made plain not only by the common sense view which permits no distinction upon the ground of navigability between the shallows and depths of navigable waters, and the authorities, cited by appellant in Note 3, supra, but by *Mayor , etc. of Mobile v. Eslava*, 9 Port. 577, and *U. S. v. Realty Co.*, 155 Fed. 583, cited by appellee. The two cases on which the district judge relied below and appellee relies here, *Toledo Shooting Co. v. Erie Shooting Club*, 90 Fed. 680, and *U. S. v. Oregon*, 295 U. S. 1, are not at all in point. They had to do not with the shallow parts of navigable waters but with bodies of water which were held to be non-navigable."

It is submitted, with respect, that the "distinction" made is not in fact a distinction, but is a statement that shows that Mr. Turner had not succeeded in conveying to the judicial mind the thought of his insistence, as attempted to be expressed by his counsel substantially in the fashion hereinbefore in this brief set out.

The opening paragraph of the matter quoted from Judge Hutcheson's opinion, shows at the outset a misconception of Mr. Turner's position. It is not, and has never been, contended for Mr. Turner that shoalness of water determines navigability. On the contrary, in another phase of the debate below, it was urgently insisted by Mr. Turner that shoalness of one common body of navigable water, deep in part and shoal in part, did not destroy navigability, but that such navigability extended up to the shore line.

It was not, and is not, Mr. Turner's point that

> "since the waters flowing the island are too shoal for actual navigation, it cannot be said thereof that, though a part of Mobile Bay, they are navigable waters."

What *is* Mr. Turner's point, and was before the Court of Appeals, is that the defined area of the marsh island known

as Pinto Island never was, in contemplation of law, water at all but was a marsh island, the title to which never passed to the State of Alabama, though some of it may have been flooded at mean high tide.

With genuine respect, it is insisted earnestly that the *Toledo Shooting Co.* case is precisely in point. Perhaps we are blinded by the zeal of advocacy—unless that be true, there is no distinction, in fact or in law, between the marsh land in Maumee Bay, title to which did not pass to the State upon its admission to the Union, but remained in the United States and was granted by patent; and the marsh land constituting Pinto Island, title to which (it is submitted) remained in the United States, and was granted by patent to the heirs of Antonio Pinto.

II

The title to the area of land mass added by artificial accretion to that part of Pinto Island that Messrs. Turner & Hartwell originally bought from Mrs. Bancroft in 1904, vested in Turner & Hartwell and then in Turner as owner of the upland from which the accretion spread and to which it attached to make one continuous area.

Preliminary Statement

It is conceded on all hands that the law of Alabama governs the parties with reference to the determination of the right *vel non* of riparian owners to the increase of land-mass by reclamation or artificial accretion building out the land from the original shoreline. It was urged, however, by the United States and the State of Alabama, that, if there be rights flowing from artificial accretion, they are dependent upon the purpose for which the accretion is made; that, if Mr. Turner's insistence be sound in any part, it is applicable only when the reclamation or artificial accretion is made in aid of access from the upland to a prac-

ticably navigable depth of water in a channel used commercially. The holding of the learned Court of Appeals is substantially in accord with that insistence. The holding is clearly stated in the paragraphs of Judge Hutcheson's opinion which are quoted below:

> "The principle invoked by appellee which supports the right of a riparian owner on navigable waters to obtain access thereto does not give the owner any title to the lands by which he obtains this access. In addition this right of access exists only as a kind of way of necessity to reach navigation.
> "While, therefore, the riparian right of access as a way of necessity to reach the deep or navigable portion of the water, including the right to fill in over the shore exists in Alabama, that right, where it exists, does not and cannot ripen into title against the State and its grantees. It does not exist here because the filling was not done under any necessity to reach, or for the purpose of reaching, deep water."

That thought, it is respectfully submitted, is denied by the adjudged cases in Alabama, further discussion of which will appear hereinafter.

Beyond any controversy: Mr. Turner had the physical substance that everybody thought was land until the two sovereigns changed their minds as hereinbefore described; the United States, or its contractors (depending in each instance on whether the dredging was done by the United States directly or was done by the United States through contractors) sought Mr. Turner's permission to deposit the spoil on his property (R. 334-348); the pipes were laid across the property and the spoil deposited on the property, the pipes being lengthened only as the land built up and it became necessary to lengthen the pipes in order to avoid building the miniature hills on the property that Mr. Turner objected to in correspondence and in his testimony.

It is a part of the history and common knowledge of the community constituting the City and port of Mobile;

and, as such, judicially known to the Court; that the entire waterfront of the City of Mobile on the west bank of Mobile River from Three-Mile Creek to and including Choctaw Point, consists of just such artificial accretion. A map illustrating how the west bank of Mobile River had grown out to the eastward *by artificial reclamation* as far back as 1853, appears in the report of *Magee v. Doe ex dem. Hallet*, 22 Ala., 699, 700. North of State Street, the "ancient margin" of Mobile River was just east of the eastern edge of Magnolia Street—half way back from Water Street toward Royal. The earth and other material from which the fills were made below One-Mile Creek, in the main were not produced by dredging but were hauled from shore origins. Between One-Mile Creek and Three-Mile Creek, the process was identical with the Pinto Island fill. As to the filling below One-Mile Creek, this (the land origin of the filling material), of course, does not affect in any way the legal principles discussed. The title to the bed or bottom, of or beneath navigable waters, is a title to the bed as *bed*—not to the individual grains of sand, pellets of mud or lumps of clay that constitute the earth making up the bed. Consequently, there is no title inherent in a gallon of fluid mud, sand and clay, that comes from the bottom and flows through the pipes of a hydraulic dredge to its final resting place in the new land that it makes. The thought of the learned Court of Appeals, as we understand it, is not that title remains in the mud moved; but that title, so to speak, goes up with the rising fill and projects itself above water level as the fill does. This concept may not be reconciled, we submit, with the Alabama decisions.

Establishment and early implementation of Alabama doctrine that title to land added by reclamation or artificial accretion, vests in the owner of the upland to which the accretion is added.

We shall not cite many cases. We think respectfully that each of these cited, merits reading. Some of them con-

tain maps which may aid in the consideration of this question.

It might be well to say here that these cited litigations; involving the title to made-land on the west bank of Mobile River, which were had in the early and middle part of the last century; were debated by outstanding lawyers of that period and were considered by able courts in elaborate opinions. The subject matter did not suffer for lack of competent thought and examination.

There was debate in the early cases about the repository of the title to the land beneath navigable waters, including the shore (the ground between mean high and mean low water tidal mark). It was steadfastly maintained by Alabama; and eventually settled in this Court as well; that the title to the soil beneath navigable waters, from mean high water mark on, within the State of Alabama, reposes in the State of Alabama as trustee.

At no time during these foundation litigations, does it seem to have been thought by our Court that the title to the made-land that constiutes the whole water front of Mobile, reposed in any other than the upland riparian owners in front of whose initial fast-land the made-land was extended.

The first case to which we shall refer is *Abbot's Ex'r v. Doe, ex dem. Kennedy*, 5 Ala., 393 (decided in 1843). This was ejectment to recover land that was

> "reclaimed from the water and filled up by defendant's testator or those under whom he * * * * * claimed."
> (Statement of Facts at p. 394).

The property adjoined, immediately on the east, lots that the defendant showed title to, which lots bordered on the margin of the river. The defendant's insistence was that he had title to these reclaimed lots by reason of the artificial accretions out from the upland lots to which he had title. The defendant was Abbot's executor.

The first question posed by the Court is

> "1. What right did those under whom defendant's testator claimed, acquire to the shore in virtue of their purchase of the contiguous land?" (Opin. at p. 394)

Further on in the opinion the Court again repeated the inquiry and elaborated the answer thus:

> "* * * * * * the inquiry is whether the purchasers of the Fort Charlotte lots, in virtue of a riparian proprietorship, became entitled to the premises in controversy. From what we have already said, it results, that *no subsequent grant by the government* can operate to divest the defendant's right to alluvion, or *change his boundary by interposing another proprietor of the soil between his land and the water.*" (Our emphasis)
> Abbot's ex'r v. Doe, *ex dem.* Kennedy, 5 Ala., at 396.

Here is repeated as an express holding, the thought that was first expressed as a query in *Hagan v. Campbell*, 8 Port. (Ala.) 9, 33,—the upland owner becomes the owner of the artificial addition to his upland, because otherwise there is an interposition of another ownership between him and the water.

The next case was *Doe ex dem. Kennedy v. Beebe, et al*, 8 Ala., 909 (decided in 1845). This case also involved lots in front of the site of old Fort Charlotte. Touching the land in controversy in this action (which was ejectment), the Court says:

> "The line of the fort lots were extended east, below high water mark, but since their sale Water Street has been laid off east of them and the land *reclaimed by art*; and, between this street and the channel of the river, and in front of the lot of which the defendanas are proprietors, the land in controversy is located." (Our emphasis).
> (Statement of Facts at p. 910).

The plaintiff asked the Court to charge the jury that the limits of the upland lots could not be extended by improvements made as riparian proprietors. The Court refused to give this charge and instructed the jury that the case of *Abbot's Ex'r. v. Doe ex dem. Kennedy*, 5 Ala., 393 (hereinbefore cited and discussed) was decisive authority against the plaintiff's right to recover. (Statement of facts at 911). The jury returned a verdict for the defendant. Plaintiff appealed, relying on the refused charge as error, and the Supreme Court affirmed the action of the trial court.

Here you have the direct issue made in terms and decided in favor of the position that we have asserted and are attempting to sustain.

Then came *Doe ex dem. Pollard's Heirs v. Greit, et al*, 8 Ala., 930. (decided in 1845). The land was between Water Street and the River and

> "was made by filling up the marsh by Tankersly or those claiming under him; some of the low ground was reclaimed in 1822 and much more since that time." (8 Ala. at p. 933)

The action was ejectment. Greit was the tenant in possession. His landlord held in trust for Gertrude Tankersly, whose husband had reclaimed the property by filling up the marsh as just hereinbefore quoted. The plaintiff lost his suit and again the Supreme Court affirmed the lower court.

The last case of the early series, that we propose to discuss, is *Doe ex dem. Kennedy's Ex'rs v. Jones*, 11 Ala., 63 (decided in 1847). This was ejectment to recover the wharf and dock at the foot of St. Louis Street. The property was on the east side of Front Street. In 1819 when Alabama became a State, the west margin of the river at St. Louis Street, at ordinary high tide, was about one-third of the way up toward Royal Street, from Water Street. From the margin out to east of Front Street, where the

wharf was in 1847, had been reclaimed by filling—the streets, by the City; and the privately owned property, by the proprietors of the adjacent lots.

The defendant had the wharf under a lease from the City. Among the questions debated was the title of the City of Mobile to St. Louis Street as it was extended eastwardly from the original shore line by artificial means. The Court thus expresses itself with reference to that question:

> "In respect to the accretions at the eastern end of St. Louis Street, *or the reclamation by human efforts*, we think that they became a part of the street, as the city extended its limits eastward, across the marsh, toward the river; quite as much as if the extension had been embraced by the original dedication. The location of Mobile, the extensive flat between the channel and the bank of the river, over which the tide flowed, the deleterious effect upon health, and the hindrance to trade, doubtless suggested the idea at a very early day, of making reclamations from the shore, as the commerce of the city furnished inducements to such improvements. This is but a reasonable and natural assumption, and authorizes the conclusion, that by dedicating the streets running east to the use of the town, and the public, to the margin of the shore, the marsh between the shore and the river was in like manner yielded up, as the wants of the community required its use."
>
> Doe *ex dem.* Kennedy's Ex'rs v. Jones, 11 Ala. at 84-85.

This is entirely in line with the preceding cases. That the owner was a municipal corporation as distinguished from a person or a private corporation, is not thought to effect in any way the reasoning or the holding.

The *Beebe* case, hereinbefore cited, came to this Court; where it is reported as *Doe ex dem. Kennedy's Ex'rs v. Beebe*, et als, 13 Howard, 25. The facts as to how the lots came into being are thus stated by this Court:

> "The defendants made title to three of these lots, which bounded on the river, and it was admitted that at the time of the sale, high water extended over their eastern limits; and that the *land now in controversy was reclaimed from the water and filled up by those under whom the defendants claimed.* (Our emphasis).
>
> Doe ex dem. Kennedy's Ex'rs v. Beebe, et als, 13 How., 25, Opinion at 26.

The Court then states the question similarly to its statement in the decision of the case in the Alabama Supreme Court, and affirms that Court.

If our position be sound, the law was settled in the two governing jurisdictions a century ago and it is unnecessary to make excursions into the decisions of other Courts.

History, and discussion of, the modern decisions relied on by the learned Court of Appeals.

These are: *Mobile Transportation Co. v. Mobile*, 153 Ala. 409 (44 So. 976); *City of Mobile v. Sullivan Timber Co.*, 129 Fed. 298; and *McDonnell v. Murnan etc. Corp.*, 210 Ala. 611 (98 So. 887).

The cases in 153 Ala. and 129 Fed. are items in a series of litigations constituting the locally notable "River Front Cases" of the turn of the century. To a proper understanding of the decisions, one must consider their background and history, which we now trace.

The foundation of all these litigations was an Act of the Legislature of Alabama of January 31, 1867 (Acts of Alabama of 1866-67, p. 307). That statute attempted to grant to the City of Mobile,

> "the shore and the soil under the Mobile River situated within the boundary lines of the City of Mobile",

as set forth in the then pertinent Act fixing the city limits.

The City attempted to takeadvantage of this statute, in the Fall of that year, by the introduction and publication

of a proposed ordinance declaring all the existing wharves in the city to be free, and attempting to discharge all persons from paying any wharfage dues for the use of said wharves.

Thereupon, Leverich, et als, filed a bill, on behalf of themselves and other persons in the same situation, seeking to enjoin the passage and enforcement of the ordinance, on the theory that it was a deprivation of property without due process of law, in violation of the appropriate provisions of the Constitution of the United States. The bill was filed in the United States Circuit Court for the Southern District of Alabama. The matter came on for hearing on motion for preliminary injunction. Able counsel were on both sides of the case, and the opinion is notable for its learning and exhaustiveness. The preliminary injunction was granted; and subsequently, on final hearing, made permanent.

The primary discussion was not over the title to the claimed land, but over the right to erect wharves to connect the uplands with the commercially navigable water—a question with which we are not concerned in the instant litigation. But in the opinion there were cited, with many others, the cases on which we rely, and the Court said, with reference thereto:

> "In several of the cases cited to me, the Supreme Court (of Alabama) adverted to the fact that *reclamation from the sea is a common practice, and they assign to the riparian owner the same benefits from his improvements as the law assigns to him from the accretions by alluvion.*" (Our emphasis)
>
> *Leverich v. Mayor of Mobile, et als, 110 Fed., 170, 172, 173, 176.*

The City having failed in this effort, the matter remained dormant until 1900, when the City made another attempt to enforce its supposed rights under the Act of 1867, by instituting the actions of ejectment that began

the River Front Cases. The first of these cases to get to the Supreme Court was *Mobile Transportation Co. v. City of Mobile 128 Ala., 335.* The property sought to be recovered by the plaintiff (the City of Mobile) in this ejectment suit against the Mobile Transportation Company was "a portion of the shore of Mobile River up to the high-water mark."

Mobile Transportation Co. v. City of Mobile, 128 Ala., 335, 337.

Long prior to 1867, the reclamation on the west or city side of Mobile River, had been concluded and the western bank stabilized; and the river front was lined with wharves which ran from this made upland (made by the reclamations theretofore long since concluded) out to the commercially navigable channel of the river. These wharves were erected, of course, over and across the shore of the river. We are all agreed that the "shore" is that portion of the soil between ordinary high tide and ordinary low tide. This was the land sought to be recovered in ejectment by the City. Should the plaintiff succeed and then should successfully exercise a claimed right to exclude the upland owner from the use of his riparian right of access to the water, the upland owner would be obliged to pay tribute to the City as the owner of the strip between him and the commercially navigable water. Hence, the suits, and their importance to the upland owners and to the community. Please note that *in none of these cases was there any suggestion of a debate over the right of an upland owner to reclaim land.* That right had been fixed more than a half century before, in the cases heretofore cited and discussed, *and had been recognized in the Leverich case growing out of this identical 1867 statute.* What *was* debated at much length and with elaborate learning and citation of authority, was the right to wharf-out, and the effect thereon of the 1867 Act. With respect, it is thought that a reading of the cases shows that the learned Court of Appeals has confused the universally recognized right to wharf-out, sub-

ject to possible destruction by the paramount right of navigation, on the one hand; and the acquiring of a fee to reclaimed property, on the other. The question of the effect on the right to wharf-out, was debated at large in the River Front Cases. *The question of title to reclaimed property was not involved, and was nowhere discussed by counsel in this group of cases.*

The title gained by reclamation, is a *title in fee to real property.*

The right to wharf-out is a *license* that is subject to destruction by the exercise by the sovereign of the paramount right of navigation. It in no sense involves the notion of a title in fee to the soil beneath the water over which the wharf extends to get to a commercially practicable depth.

The final chapter of the *River Front Cases* group of litigations was written in *Mobile Transportation Co. v. City of Mobile*, in 153 Ala., 409, (44 So. 976) decided in 1907 (cited by the learned Court of Appeals in the instant case). The supposed foundation right of the City, had been destroyed by the decision in the *Docks Company* case, reported in 146 Ala., 198 and decided in 1906. But the City had, in the first of its ejectment suits, recovered a judgment in ejectment, against the Mobile Transportation Co., which judgment was affirmed by the Alabama Supreme Court in 1900 (*Mobile Transportation Co. v. City of Mobile*, 128 Ala., 335.) So when the City's main effort blew up in 1906, it still had some apparent salvage in its subsisting judgment in ejectment against the Transportation Company. So the City threatened to build a fence along the shore (recovered by it in the ejectment suit), between the River and the Transportation Company's upland, thus destroying access to the navigable water and destroying completely the major factor in the value of the upland. Thereupon, the upland owner (the Transportation Company) filed its bill in equity *to enjoin the city from cutting off the upland owner's access to the water. The whole debate*

was over this issue. The question appears clearly in the opinion, with the answer thereto, at pp. 413, 417-18.

The remaining case, of this group, cited by the learned Court of Appeals, is *Mobile vs. Sullivan Timber Co.*, 129 Fed. 298, decided by the Circuit Court of Appeals for the Fifth Circuit in 1904. But examination of that case shows that it does not touch the question debated here. A reference to the opinion of Judge Toulmin in the District Court (110 Fed. 186) shows that the action did not concern reclaimed land added to the upland, *but concerned only the shore*—the land between high and low water mark which had *not* been reclaimed. We quote the pertinent part of the opinion:

> "The bill alleges in a general way that the lands sued for lie below ordinary high-tide water mark of the Mobile River, within the corporate limits of the City of Mobile. - - - It may, however, be inferred that the lands sued for are shore lands lying below ordinary high-tide water mark of the Mobile River; that Complainant has the legal title to the upland bounded by or abutting on said shore lands; and that the wharves and other improvements made by Complainant - - - are erected over the said shore out to the channel or navigable part of the river."
>
> *Sullivan Timber Co. v. Mobile, 110 F. 186, 188.*

And the Circuit Court of Appeals, on the appeal, quoted with approval (see p. 302 of 129 Fed.) from the decision of the Supreme Court of the United States in the *Mobile Transportation Co.* case, the matter set out below:

> "Of course if riparian proprietors have acquired the title to the property below high water mark by a grant or prior possession, good against the State, they could only be dispossessed by proceedings in eminent domain."
>
> *Mobile Transportation Co. vs. Mobile, 187 U. S. 479, 487.*

It is thought, with respect, that the remaining case cited by the learned Court of Appeals does not bear upon the

matter presently debated. The case (*McDonnell v. Murnan Shipbuilding Corp.*, 210 Ala. 611; 98 So. 887) was an action brought under *Section 4818 of the Code of Alabama of 1907*. That Section is set out below:

> "*Lien declared.*—Any riparian proprietor who has lawfully erected or maintains in front of his property, in any water of this State, any boom, bulkhead, piles, or other structure, shall have right to charge any person who shall fasten thereto any vessel, boat, flatboat, raft, log, or stick of timber or wood, five dollars a day for every vessel or boat other than a flatboat; two dollars a day for each flatboat, five cents a day for every pole, log, or stick of timber or wood, and shall have a lien for the collection of such charges upon such vessel, boat, flatboat, raft, log, or stick of timber or wood."

The plaintiff averred, in his complaint, that he was a riparian proprietor; that he had lawfully erected and maintained in front of his property, piles; that the defendant had moored rafts, logs, and sticks of timber to the said piles during a period stated; and the plaintiff claimed damages therefor at the statutory rate.

In the trial court, the case went off on demurrer to the complaint. The plaintiff took a non-suit and appealed. The sole question before the Supreme Court of Alabama was the sufficiency of the complaint to state a cause of action under the statute. There was no thought, question or suggestion of artificial accretion or reclamation, nor any question or discussion of the title to additions to the upland.

It would seem that the only possible reason for citing the case, would be the matter set out in *Division (4) of the opinion*, which, with the authorities cited, is set out below:

> "(4) By immemorial usage and custom in this state the doctrine is recognized that a riparian proprietor, whose land is bounded by a navigable stream, has a right of access to the navigable part thereof

> in front of his land, and to construct a wharf, pier, or piles projecting into the stream for his own use or the use of others; but this right is subject to such rules and regulations as the Legislature may prescribe for the protection of the public. Turner v. City of Mobile, 135 Ala. 73, 33 South. 132; Mobile Trans. Co. v. City of Mobile, 153 Ala., 409, 44 South. 976, 13 L.R.A. (N.S.) 352, 127 Am. St. Rep. 34; Sullivan Timber Co. v. City of Mobile (C.C.) 110 Fed. 186; Shively v. Bowlby, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331."
>
> *McDonnell v. Murnan Corp., 210 Ala. 611, 613.*

What is stated in the quoted matter is hornbook law in Alabama, and has never been questioned in the instant case.

The notion that even if Mr. Turner could reclaim westwardly (toward the River), he could not reclaim eastwardly (toward the Bay).

This finds expression in Judge Hutcheson's opinion at the end of the matter hereinbefore quoted therefrom. The stated thought of the learned Court of Appeals is that while there exists a "right to fill in over the shore" in Alabama, that right

> "does not exist here because the filling was not done under any necessity to reach, or for the purpose of reaching, deep water."

We understand this suggestion to be based on the notion that Mobile River, on the west, is navigable, but that the water on the east (the water of Mobile Bay and its estuaries) is not navigable. In support of this thought the United States offered testimony below, by Messrs. Ewin and Durant, that one had to go from a half mile (Durant) to a mile (Ewin) to reach what Mr. Ewin referred to as "full channel depth", the slope from the eastern edge of Pinto Island being "very gradual" (Ewin, R. 98-99; Durant, R. 133-34). Mr. Ewin stated that he understood the depth of the water at the point where "full channel depth" would

be reached to the eastward, was 12 to 15 feet. Mr. Durant identified this as the mouth of Tensas River.

It is submitted that the suggestion is without support in law. The basic thought underlying the Alabama holdings, is thus stated in *Abbot's Ex'rs v. Doe, ex dem. Kennedy*, 5 Ala., 393, 396.

> "From what we have already said, it results, that no *subsequent* grant by the Government can operate to divest the defendant's right to alluvion, or *change his boundary by interposing another proprietor of the soil between his land and the water.*"

Please note that the upland proprietor's right is, that there shall not be interposed another ownership between his upland and "the water"—*not* deep water, *not* the channel, not "full channel depth", but "the water".

The reason is plain. The *right* of navigation extends to the shore line; it does not cease at some indeterminate depth of water. The United States, at any time that it might deem such to be appropriate in the exercise of its paramount right in the interest of navigation, may dredge on the *east side* of Pinto Island. Such may be thought not only possible, but likely. Here is a large land mass suitable for waterside industry and commerce but at present commercially accessible by water only from a narrow artery through which moves the sea-borne commerce of a major port. The dredging of a water front for wharves and slips along the eastern side of Pinto Island would seem a logical step in the port's progress.

The very base of the positions of the two sovereigns, is that the bed belonged to the State because the water above was public water. If the fill eastwardly from Mr. Turner's upland belonged to the State under the theory of both sovereigns, it was because it was erected on the bed of a body of public water. But under Alabama law no such interposition may be made. The sovereigns sit upon the horns of this dilemma: if the water to the east of Turner's upland, was *not* public water, the State had no title to any

fill thereon; while, if the water east of Turner, *was* public water, any fill thereon would be interposed between him and the water and title would inure to Turner under the Alabama doctrine.

That shoalness of the water near the shore does not affect the question at all, is clearly illustrated by the Rockaway Bay case (*United States v. Realty Co.*, 155 Fed., 583) cited to this very proposition by the learned Court of Appeals in that part of Judge Hutcheson's opinion that deals with the marsh-island phase.

Conclusion

This is an extraordinary case.

There exist in it factors that would constitute both an estoppel *in pais* and an estoppel of record, if this were a cause pending between individuals, or an individual and lesser public or quasi-public corporations. If we concede that *United States vs. California*, 332 U. S. 19, is conclusive against invoking the doctrine of estoppel as a bar to this action, yet the facts give a color and atmosphere to the whole proceeding that should be of aid in enabling the Court to arrive at a just determination of the appeal. That color and atmosphere, it is thought with respect, are not agreeable for contemplation by citizens of either the United States or the State of Alabama. This astonishing litigation began as a proceeding for condemnation, which *ex necessitate* admits that there is no title in the sovereign, and asserts title in the persons against whom the proceeding is instituted; and then, in mid-career and after several years in court, changes to a sort of quasi bill-to-quiet title, asserting title in the sovereign and denying title in the defendant in the proceedings. There is precedent—before the decision of the learned Court of Appeals in the instant case we should have hesitated to tern it authority—for such a curious hybrid, that it is respectfully submitted, is completely without warrant in any of the normal and logical

concepts of law; and the practical situation that the United States has brought about requires the going forward with the suit to final conclusion as an action of condemnation, because there is no way to undo what was done when possession was taken in 1941, and construction was had of the huge addition to the Alabama Dry Dock & Shipbuilding Corporation's ship building plant on this property by the United States Maritime Corporation.

The radical changes of position by each sovereign, have been pointed out in detail. Mr. Turner might well take as his text, the admonition of the psalmist—

"Put not your trust in princes".

Throughout the years, the United States sought repeatedly of Mr. Turner; and Mr. Turner gave to the United States or its contractors; the privilege or permission to deposit dredging spoil on property necessarily recognized by the sovereign as Mr. Turner's, by the very act of its seeking such permission. This permission was quite valuable, in money, to the sovereign, for that it saved largely in the cost of the dredging from which came the spoil deposited. Then the sovereign took possession of Mr. Turner's land by virtue of a proceeding in condemnation with a contemporaneous order for immediate possession. This was the only way in which immediate possession could have been taken lawfully. Then, more than a year after taking possession, the sovereign so effaced, altered and covered the land-marks that had been in place since 1906, as to make it impracticable now to locate them definitely.

Then, after having done all this, and very materially altered Mr. Turner's situation for the worse, with reference to establishment of his title: the sovereign repudiates completely its former position and asserts title in itself.

From the birth of our Republic, the constant boast of our people has been that ours is a government of laws, not of men. In the last decade, there has been much to make one doubt whether this boast may longer be justified. Ap-

parently the whim of the executive of the moment controls governmental action, prevents continuity of purpose, and destroys in the citizen any sense of certainty of permanence in his dealings with his government.

The fundamental ethical concepts that govern the conduct of men in their relations with each other, ought to govern the conduct of men in the mass—the State—with the individuals of the mass. It should not be that the ordinary notions of justice as between individuals, should fail completely as to dealings between the government and its citizens.

The function of a court of justice is to be just that. When a result, reached by what Professor Pomeroy was fond of styling "word logic", is repugnant to the sense of right inherent in us all—is contrary to that general concept of justice which has the common consent of mankind; it behooves a court to scrutinize most closely the supposed facts and reasoning thought to compel such result. Only when inexorable logic, reasoned from firmly established facts, compels to the distasteful conclusion, can the Court arrive at it.

Respectfully submitted,

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